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No. 628

In the Supreme Court of the United States

October Term, 1956.

REX F. CURRY, THE CARTER OIL COMPANY, a Corporation, and C. E. McCAUGHEY, *Petitioners,*

vs.

K. O. GATES and LOUISE SMALLING, *Respondents.*

PETITION for WRIT of CERTIORARI

To the Supreme Court of the State of Oklahoma.

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IN THE SUPREME COURT OF THE UNITED STATES.
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REX F. CURRY, THE CARTER OIL COMPANY, a Corporation, and C. E. McCAUGHEY, *Petitioners*,

vs.

K. O. GATES and LOUISE SMALLING, *Respondents*.

PETITION for WRIT of CERTIORARI

To the Supreme Court of the State of Oklahoma.

Rex F. Curry, The Carter Oil Company, a corporation, and C. E. McCaughey pray that a writ of certiorari issue to review the judgment of the Supreme Court of Oklahoma, entered in the above-entitled case on November 8, 1955, as such judgment was corrected by the Supreme Court of Oklahoma by order entered on September 18, 1956.

Citations to Opinions Below.

The opinion delivered orally by the Judge of the District Court of Garvin County, Oklahoma (R. 76), is printed in Appendix B hereto, *infra*, p. 14. The opinion of the Supreme Court of Oklahoma (R. 96) entered on March 31, 1953, is reported only in the Journal, Oklahoma Bar Association, April 4, 1953, p. 558, and is printed in Appendix B

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hereto, *infra*, p. 14. The opinion of the Supreme Court of Oklahoma (R. 115) entered on November 8, 1955, is reported only in the Journal, Oklahoma Bar Association, November 12, 1955, p. 1748, and is printed in Appendix B hereto, *infra*, p. 22. The order entered September 18, 1956 (R. 129), correcting former opinion entered November 8, 1955, is unreported and is printed in Appendix B hereto, *infra*, p. 27. The opinion of November 8, 1955, as corrected is reported in 301 P. 2d 659 and is printed in Appendix B hereto, *infra*, p. 29.

Jurisdiction.

An Order of the Supreme Court of Oklahoma was entered on November 8, 1955 (R. 114), *infra*, p. ~~27~~ 22, substituting judgment and opinion entered November 8, 1955 (R. 115), *infra*, p. 22, for the former opinion (R. 96), *infra*, p. 14. The substituted opinion was corrected by order entered September 18, 1956 (R. 129), *infra*, p. 27. A timely petition for rehearing filed on November 22, 1955 (R. 125), was denied on September 18, 1956 (R. 128). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1257 (3), since a title, right, privilege and immunity claimed under Statutes of the United States is drawn in question.

Question Presented.

Upon the death in 1937 of an Indian of the Five Civilized Tribes owning an inherited restricted and tax exempt undivided interest in a tract of land—at which time other undivided interests in said tract of land were owned by persons in whose hands such interests were unrestricted or taxable—whether the first proviso of Section 1 of the Act of Congress approved January 27, 1933 (47 Stat. L. 777), is to be construed to mean that the entire interest of such

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deceased Indian shall remain restricted and tax exempt in the hands of her heirs, if all her heirs were restricted Indians of one-half or more Indian blood.

Statute Involved.

The statutory provision involved is the first proviso of Section 1 of the Act of Congress, approved January 27, 1933 (47 Stat. L. 777), which reads as follows:

> "*Provided,* That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law:"

Section 1 of said Act is printed in full in Appendix A hereto, *infra,* p. 13.

Statement.

This action was brought on July 2, 1948, in the District Court of Garvin County, Oklahoma, by petitioner Rex F. Curry against respondents, K. O. Gates and Louise Smalling; Louie Winship, a three-quarter blood Choctaw Indian; and the United States, to quiet title to an undivided 1/12 interest in a tract of land in Garvin County, Oklahoma, acquired in 1946 by an approved deed from Winship (R. 8). The United States elected not to remove to the Federal Court (R. 21). Louie Winship defaulted (R. 79). Respondents filed an answer and cross-petition (R. 22) asserting ownership of the land in question under a prior unapproved deed (R. 24) from Winship and making petitioners The

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Carter Oil Company and C. E. McCaughey additional parties to the suit.

The case was tried before the court (R. 79) on stipulated facts (R. 62), Appendix C hereto, *infra*, p. 34, substantially as follows: The land in question had been allotted to Sallie Lowman, a full-blood Choctaw Indian and had been designated as tax exempt during her lifetime (R. 62), *infra*, p. 34, pursuant to an applicable Act of Congress. Said allottee died intestate November 3, 1933, seized and possessed of said restricted and tax exempt land, which was inherited in equal shares by her six full-blood Choctaw Indian heirs (R. 63), *infra*, p. 35. Two of said heirs conveyed all of their restricted interest to a white man in 1934, which interest was unrestricted thereafter (R. 64-65), *infra*, p. 35. Louisa Winship, one of the remaining heirs, died intestate on August 22, 1937, seized and possessed of her inherited undivided 1/6th interest (R. 64), *infra*, p. 36, leaving as her sole heirs the said Louie Winship, husband, a three-quarter blood Choctaw Indian, and Flora May, daughter, a seven-eighths blood Choctaw Indian (R. 65), *infra*, p. 36. Louie Winship executed a warranty deed dated June 6, 1940, to respondent Smalling purporting to convey all of his inherited interest in the land (R. 65), *infra*, p. 36. The deed was not approved by the Secretary of the Interior or any County Court. On July 15, 1946, Louie Winship executed an approved oil and gas lease covering his said inherited interest, which lease was later assigned to petitioner, The Carter Oil Company (R. 66), *infra*, p. 37. On November 12, 1946, Louie Winship conveyed, subject to said lease, all his said inherited interest to petitioner Curry with the approval of the proper County Court (R. 66), *infra*, p. 37. Petitioner McCaughey acquired an

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undivided 1/96th mineral interest in said land remotely from petitioner Curry (R. 67), *infra*, p. 38.

The Federal question here involved was first raised in the answer and cross-petition of respondents by the allegation that under the "applicable laws of Congress the 1/12 interest in and to said lands so inherited by Louie Winship was unrestricted" (R. 24). The Federal question was again raised in the separate answer of petitioner The Carter Oil Company to said cross-petition in which it was specifically pleaded that "the undivided 1/12 interest in said land inherited by said Louie Winship was restricted in his hands under the provisions of the Act of Congress approved January 27, 1933 (47 Stat. L. 777)" (R. 35), and that the Winship deed to respondent Smalling, therefore, was invalid for lack of proper approval. The reply and answer of petitioner Curry to said cross-petition (R. 39) and the answer of petitioner McCaughey (R. 41) similarly raised the Federal question.

The case was tried before the court without a jury entirely upon the Federal question so presented. The District Court held said interest to have been restricted under the first proviso of Section 1 of said Act of Congress and canceled the unapproved conveyance from Winship to respondent Smalling (R. 76). Respondents appealed to the court below assigning, among other things, as error, "that the court erred in holding that the interest of Louie Winship in the land in controversy was restricted, and in quieting the title thereto in defendants in error" (R. 2).

The application of said Act of Congress to the facts here involved became the sole issue before the court below. On March 31, 1953 the court below entered its judgment and opinion (R. 96), *infra*, p. 14, affirming the judgment of

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the trial court holding the inherited interest of Winship to have been restricted and tax exempt under the first proviso of Section 1 of said Act of Congress. The essence of the opinion is stated in the fourth paragraph of the syllabus as follows (R. 97), *infra*, p. 15: "The 1933 Act, properly construed, does not require that the ancestor must die seized and possessed of the full and undivided fee simple title to the land, which is the subject of the inheritance. All the Act requires is that the 'entire interest' owned by the ancestor descended to and was inherited by restricted Indians."

Upon rehearing, the court below entered an order on November 8, 1955 (R. 114), *infra*, p. 22, withdrawing its earlier opinion and substituting therefor its opinion adopted November 8, 1955, wherein it reversed the judgment of the trial court holding and adjudging said interest of Winship to have been unrestricted under said Act of Congress (R. 115), *infra*, p. 22.

Petition for rehearing filed by your petitioners (R. 125) was denied by order entered by the court below on September 18, 1956 (R. 128), and on that day the court below entered an order (R. 129), *infra*, p. 27, correcting its opinion of November 8, 1955 (R. 115), *infra*, p. 22. As corrected, the opinion stated that said inherited interest of Winship was not restricted under said Act of Congress because, at the time of his inheritance of such interest in 1937, although the interest was restricted and tax exempt in Winship's deceased wife, the entire interest in the tract of land was not owned or held by restricted Indians since a non-Indian acquired an interest in 1934 (R. 130-131), *infra* p. 35; judgment was accordingly rendered therein reversing the decision of the trial court and remanding the case to the District Court of Garvin County, Oklahoma, to enter

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judgment for the respondents. Seven justices participated in the opinion, two of whom dissented without opinion.

The decision below thus necessarily rests upon the determination of a Federal question by the majority of the court—the proper interpretation of the first proviso of Section 1 of Act of Congress approved January 27, 1933. The Federal question is thus properly presented for consideration by this Court.

Reasons for Granting the Writ.

The Oklahoma Court has decided a Federal question of substance, not heretofore decided by this Court nor, in fact, by any Federal or State court. In reaching its decision, it clearly misinterpreted an Act of Congress with the result that the Act as applied to the facts in this case is wholly ineffective to accomplish its intended purpose in the determination of the restricted and tax exempt status of a substantial amount of land now held by members of the Five Civilized Tribes of Indians in the State of Oklahoma, as such determination is required to be made by: the Indians themselves and those with whom they deal; the Department of the Interior in its supervisory relationship to the Indian wards of the Government; and those agencies of the State of Oklahoma having the power to levy upon taxable Indian land in the state.

I.

There are no decisions from any court construing the Act involved herein precisely with regard to the inherited interest of restricted part-blood Indian heirs where an undivided interest in restricted and tax exempt land is in-

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herited entirely by restricted Indians[1] and where, at the time of the immediate ancestor's death, some other undivided interest in the land is owned by another person in whose hands the land is taxable and unrestricted. However, in light of decisions otherwise construing the Act; in due recognition of the well-established rule that all doubts arising in the interpretation of legislation affecting Indians should be resolved in favor of the Indians and restrictions; and the administrative construction put upon the Act in practice[2]—we are firmly convinced that the Act should be construed to mean the restrictions and tax exemption of the interest of the ancestor continue to the part-blood restricted heirs under the circumstances of the case before this Court, as it was construed by the State District Court (R. 76), *infra*, p. 14, and by the Oklahoma Supreme Court in its first opinion written in this case. (R. 96) *infra*, p. 14.

Under circumstances where an allottee, as the sole owner of a tract of restricted and tax exempt land, died leaving heirs one of whom was her white husband, the court held in the case of *Brown* v. *Stufflebean*, 187 F. 2d 347, that the inherited interests of the part-blood Indian heirs of one-half or more degree of Indian blood descended to them free

1. Part-blood Indians of one-half or more degree of Indian blood whose inherited interest in land had not previously been restricted after passage of Act of May 27, 1908 (35 Stat. L. 312), were held to be "restricted Indians" under Section 1 of Act of January 27, 1933, *supra*. Glenn v. Lewis, 105 F. 2d 398.

Full-blood Indians are "restricted Indians" under all circumstances as to their inherited interest in restricted land. Their conveyance of such interest requires approval of the proper County Court. Section 9, Act of May 27, 1908, *supra;* Section 8, Act of January 27, 1933, *supra;* Section 1, Act of August 4, 1947, 61 Stat. L. 732; U. S. v. Easley, 33 Fed. Supp. 442.

2. See Brief of *Amici Curiae* filed below in support of petitioners' Petition for Rehearing by George B. Schwabe, Jr., Regional Solicitor, Tulsa Region, Department of the Interior, Tulsa, Oklahoma, *et al.*, for and on behalf of the Secretary of the Interior, copies of which have been filed herein with this petition.

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of restrictions. The decision of the Federal Court of Appeals only construed the phrase "entire interest" as used in the Act to apply upon the condition that the entire interest belonging to an ancestor be acquired by inheritance solely by restricted Indians. Since no unrestricted interests were outstanding in others at the death of the ancestor, the facts presented in the cited case differ materially from those before this Court. Nevertheless, the court below cited the decision in *Brown* v. *Stufflebean, supra,* as its authority to construct a further meaning for the quoted phrase "entire interest" and to impose as an additional condition upon the application of the Act that, not only must the entire interest belonging to the ancestor be restricted and tax exempt and be inherited entirely by restricted Indians, but all other interests which may have been owned by others than the ancestor on the date of death, likewise must have been held by them restricted and tax exempt. We submit that the court below erred in reaching such a conclusion.[3]

We submit that the word "entire" was intended to be used to modify the *interest* in a tract of land *belonging* to a member, or members of the tribes as a descriptive class, which entire interest remained restricted and tax exempt when "acquired by inheritance, devise, gift or purchase, with restricted funds by or for restricted Indians." Indeed, if Congress intended to create new restrictions and tax exemptions for the benefit of an entirely new class of Indians, some of whom had never before enjoyed these benefits, then Congress surely did not intend to condition the enjoyment of those benefits upon the requirements imposed

3. Brown v. Stufflebean, *supra;* Glenn v. Lewis, *supra;* U. S. v. Easley, *supra,* and U. S. v. Watashe, 117 F. 2d 947, are cited in the opinion of the court below "with reference to this and related matters" (R. 122, 131, *infra,* pp. 26 and 28. No other cases are cited. None of the decisions sustain the conclusion reached by the court below.

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by the court below; namely, that every other interest, share, or portion of the fee estate[4] also be restricted and tax exempt. If the interpretation of the court below is allowed to stand, then, the manifest purpose of the Act would be defeated in the event of a purchase of less than the fee simple title made with restricted funds for a restricted Indian, or a conveyance—as occurred in this case, or by the ancestor during his lifetime—of an undivided interest, or any interest in land of less than the full fee estate, such as: all or part of the mineral estate; a lease for years; or a real estate mortgage.

It will be observed that the proviso does not expressly or by implication limit the period of restriction and tax exemption only *during the life of* the Indian acquiring an interest in the land. The phrase *during the life of* shows an intent to extend to restricted Indians, otherwise qualifying under the Act, the benefits thereof granted predecessors who held the same tax exempt and restricted at their death, however acquired by the predecessor, either by allotment, inheritance, devise, gift, or purchase under the various applicable Acts of Congress.

II.

While we think the proviso to be stated clearly enough to support our position, the choice and arrangement therein of the critical words in question appear to have created doubts in the minds of the members of the court below, as evidenced by the opposite conclusions reached in the various opinions of the court and the dissents thereto. We

4. Webster's International Dictionary defines "interest" as a "right, title, share or participation,"

"• • • 'interest in land' may refer to any one of a variety of estates or fractional share in realty including net equity or fractional property value possessed by the owner • • •." In re Rood's Estate, 38 N. W. 2d 70.

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believe, then, the court below further erred in its failure to give due consideration to the well-recognized rule to be followed in construing legislation dealing with Indians, that all doubtful expressions should be resolved in favor of the Indians and restrictions,[5] as stated by the court in *Taylor* v. *Tayrien*, 51 F. 2d 884, at page 890, certiorari denied 284 U. S. 672, 52 Sup. Ct. 127, 76 L. ed. 569:

> "Moreover, it has long been the policy of this government to construe statutory language in favor of the Indians. In *Choate* v. *Trapp*, 224 U. S. 665, 675, 32 S. Ct. 565, 569, 56 L. ed. 941, the Court said: 'But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith'."

III.

Although Sections 1 and 8 of the Act of January 27, 1933, *supra*, were repealed by Section 12 of the Act of August 4, 1947, 61 Stat. L. 732, Section 1 of the Act of 1947 requires the approval by the proper County Court of the conveyance "of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, where such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired the same," and Section 6 of said Act of 1947 deals with the continuation of tax exemptions acquired before the passage of the Act, including tax exemptions acquired under the Act of January 27, 1933. The Act of August 11, 1955, 69 Stat. L. 666, has now extended

5. See also, In re Penn, 41 F. 2d 257; Drummond v. U. S., 131 F. 2d 568; Ward v. U. S., 139 F. 2d 79; Glenn v. Lewis, *supra*.

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all restrictions and tax exemptions applicable on the da
of the passage of that Act. It is, therefore, essential
the proper application of Acts now in force to establis
the existence of restrictions and tax exemptions attachi
to lands of part-blood restricted Indian heirs by the oper
tion of Section 1 of the Act of January 27, 1933.

Conclusion.

We respectfully submit that in view of the importanc
of the question presented and the clear purpose and inte
of Congress in passing the Act here under consideratio
the Petition for a Writ of Certiorari should be granted an
the judgment of the Supreme Court of Oklahoma should b
reversed.

Respectfully submitted,

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Appendix A.

STATUTE INVOLVED.

Section 1, Act of Congress, approved January 27, 1933; 47 Stat. L. 777.

PUBLIC LAW—NO. 322—72d CONGRESS.
(H. R. 8750)

AN ACT Relative to restrictions applicable to Indians of the Five Civilized Tribes in Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: *Provided,* That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: *Provided further,* That such restricted and tax-exempt land held by any one, acquired as herein provided, shall not exceed one hundred and sixty acres: *And provided further,* That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495).

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Appendix B.

OPINION OF JUDGE OF DISTRICT COURT OF GARVIN COUNTY, OKLAHOMA,

Delivered orally in open Court at conclusion of trial on October 18, 1949. (R. 76)

By the Court: With reference to Section 1, of Public Laws No. 322, 72nd Congress, being House Resolution 8750, approved January 27, 1933,, the Court is of the opinion that the first portion of the first proviso of such section is subject to two interpretations. The words, "that where the entire interest in any tract of restricted and tax exempt land belonging to members of the Five Civilized Tribes," is subject to the interpretation that the tract must belong to the members of the Tribe. It is also subject to the interpretation that the interest must belong to the Tribe or members of the Tribe. The Congress was interested in Indians and their lands, therefore finds that interpreting this provision he is under the duty to give this portion of the Section the construction which would, in effect, cause it to read in something like this manner: "that where the entire interest in any tract of restricted and tax exempt land, which interest belongs to members of the Five Civilized Tribes." Under that interpretation the Court finds that the plaintiff and the defendants, other than the defendants Gates and Smalling, are entitled to recover and render judgment for them and allows an exception.

(Filed in Supreme Court of Oklahoma, Mar. 31, 1953; Andy Payne, Clerk.)

In the

SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 34,516

K. O. Gates and Louise Smalling, Plaintiffs in Error,

vs.

Rex F. Curry, The Carter Oil Company, and E. C. McCaughey, Defendants in Error.

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SYLLABUS.

1. An interest in tax-exempt lands, inherited by a 3/4ths blood citizen of the Choctaw Tribe of Indians, is subject to the restrictions imposed by Section 1 of the Act of Congress of January 27, 1933, 47 Stat. 777, and may not be alienated except as provided by acts of Congress.

2. The 1933 Act providing that restricted Indian lands acquired by inheritance by restricted Indians should remain restricted was intended, in view of other acts and administrative construction to restricted land of half-bloods, or more acquired by inheritance, and hence the 1/12th interest in a full-blood Indian's allotment which a 3/4ths blood Choctaw Indian inherited was restricted, and a deed executed by such 3/4ths blood Choctaw Indian without approval of the Secretary of the Interior or Oklahoma County Court, was invalid.

3. Where an allottee, a full-blood Choctaw Indian, dies intestate possessed of tax-exempt and restricted land, leaving six surviving heirs of one-half or more Indian blood, and where one of said surviving heirs, a, member of the tribe, thereafter dies intestate vested with an undivided 1/6th interest in the restricted and tax-exempt land, the provisions of Section 1 of the 1933 Act applies where the "entire interest" of that heir is inherited by restricted Indians of one-half degree or more of Indian blood.

4. The 1933 Act, properly construed, does not require that the ancestor must die seized and possessed of the full and undivided fee simple title to the land, which is the subject of the inheritance. All the Act requires is that the "entire interest" owned by the ancestor descended to and was inherited by restricted Indians.

5. Section 1 of the 1933 Act applies to a "second inheritance" as the Act was intended to protect restricted Indians whether they take by inheritance from the allottee or from an heir of the allottee.

Appeal from the District Court of Garvin County, Oklahoma; Hon. Ben T. Williams, Judge.

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Action by Rex F. Curry and others against Louie Winship and others to cancel deed and quiet title, from a judgment granting relief to plaintiffs, K. O. Gates and Louise Smalling appealed.

Affirmed.

Charles L. Orr, Oklahoma City; T. H. Ottesen, Oklahoma City, for Plaintiffs in Error. Garvin & Shumate, Pauls Valley, for Defendant in Error, Rex F. Curry. Curtis & Blanton, Pauls Valley, Forrest M. Darrough, Walter Davison, Varley H. Taylor, Tulsa, for Defendant in Error, The Carter Oil Co. Brown & Verity, Oklahoma City, for Defendant in Error, C. E. McCaughey.

[OPINION.]

Per Curiam. This action involves the title to an undivided 1/12th interest in a tract of land containing 140 acres in Garvin County, Oklahoma, and described as follows:

"The North Half (N2) of Southeast Quarter (SE4) of Southwest Quarter (SW4) and South Half (S2) of Southeast Quarter (SE4) and South Half (S2) of North Half (N2) of Southeast Quarter (SE4) of Section Twenty-three (23), Township Two (2) North, Range Two (2) West."

All facts material to the determination of the question involved were stipulated by the parties.

It was stipulated that the land was a portion of Sallie Lowman's allotment, she being a full-blood Choctaw Indian opposite Roll Number 2743, and that the same was designated as tax-exempt May 27, 1930. That the allottee died November 3, 1933, while domiciled and residing in McCurtain County, Oklahoma, seized and possessed of the land. That she left surviving her as her sole and only heirs a second husband and 5 children, all full-blood Choctaw Indians, who inherited an undivided 1/6th interest each.

That on the 8th day of February, 1934, Willy Battiest, second husband, and Catherine Taylor, a daughter, by war-

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ranty deed conveyed a 1/3rd interest to K. O. Gates. That this deed was approved by the county court of McCurtain County, Oklahoma. That thereafter K. O. Gates sold and conveyed this interest to E. A. McConnell and Sam Muse and that these grantees are not restricted Indians or of any Indian blood.

That Louisa Taylor, now Winship, a daughter of the allottee, who had inherited an undivided 1/6th interest in the land, died intestate August 22, 1937, seized and possessed of the interest and left as her sole and only heirs her husband, Louie Winship, an adult 3/4ths blood Choctaw Indian not enrolled, and her daughter, Flora Mae Winship, a 7/8ths blood Choctaw Indian, not enrolled, who inherited in equal shares the undivided 1/6th interest which Louisa Taylor, now Winship, had inherited from her mother, the allottee. That these heirs had been determined by the county court of McCurtain County, Oklahoma, on June 21, 1945. It was further stipulated that the 1/3rd interest conveyed by Willy Battiest and Catherine Taylor was neither tax-exempt nor restricted when Louisa Taylor, now Winship, died in 1937.

The title to the undivided 1/12th interest which Louie Winship inherited from his wife, Louisa Taylor, now Winship, is here involved.

It was further stipulated that on June 6, 1940, Louie Winship executed and delivered a warranty deed to Louise Smalling which purports to convey his undivided 1/12th interest; but that the deed was not approved by the Secretary of the Interior or by any county court. That on the 15th day of July, 1946, Louie Winship executed and delivered to L. S. Youngblood an oil and gas lease covering his undivided 1/12th interest in the land for a term of 10 years and as long thereafter as oil and gas might be produced. That this lease was duly approved by the county court of McCurtain County, Oklahoma, on September 18, 1946. That on April 4, 1947, L. S. Youngblood assigned the lease to the defendant Carter Oil Company. That on November 12, 1946, Louie Winship executed and delivered a warranty deed to

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Rex F. Curry conveying his undivided 1/12th interest in the land, subject to the oil and gas lease, which deed was duly approved by the county court of McCurtain County, Oklahoma, on November 27, 1946. That thereafter Rex F. Curry conveyed to I. M. Dunn an undivided 1/8th interest of the undivided 1/12th interest in and to the oil and gas and other minerals. That thereafter on the 24th day of March, 1947, I. M. Dunn conveyed this mineral interest to C. E. McCaughey.

Upon these stipulations the lower court rendered a judgment canceling the deed from Louie Winship to Louise Smalling for the reason that it had not been approved by the Secretary of the Interior, or by any county court, and upheld the title of Rex F. Curry, Carter Oil Company, a corporation, and C. E. McCaughey as above set out.

From this judgment plaintiffs in error, K. O. Gates and Louise Smalling, appeal asserting that the court committed error in canceling the unapproved deed of Louie Winship to Louise Smalling for the reason that the interest of Louie Winship was not restricted at the time. In support of this contention they assert that if the Act of Congress of January 27, 1933, 47 Stat. L. 777, is properly construed, the interest of Louie Winship was not restricted and tax-exempt at the time he inherited it from his deceased wife.

The first proviso of section I of the Act upon which they rely is as follows:

> "Provided, that where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds by and for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but no longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law;"

They contend that since a 1/3rd interest in the entire tract inherited by the full-blood heirs of the allottee had been sold to persons of non-Indian blood prior to the death of Louisa Taylor, now Winship, from whom Louie Winship inherited the interest, this interest was unrestricted and that Louie Winship could deed it without approval by the Secretary of the Interior or any county court.

The position of plaintiffs in error is clearly stated in their reply brief:

> "We contend that the sale by two of the heirs took the land out of the category wherein the proviso could be applied when one of the remaining heirs died. The entire interest in the tract was no longer restricted and tax-exempt and did not belong to Indians when Louie Winship acquired the interest in controversy by inheritance from his wife."

We are unable to agree with this position. The United States Court of Appeals for the Tenth Circuit in Glenn v. Lewis, 105 Fed. 2d 398, the opinion being by Justice Phillips, said:

> "The 1933 act providing that restricted Indian lands acquired by inheritance by restricted Indians should remain restricted was intended, in view of other acts and administrative construction to restrict land of half-bloods, or more acquired by inheritance, and hence the one-third interest in an Indian homestead allotment which 7/8ths blood Choctaw Indian inherited was restricted, and mortgage and deeds executed by Choctaw Indian without approval of Secretary of Interior o Oklahoma County Court, were invalid."
>
> "Act January 27, 1933, Section I, 47 Stat. 777."

This court, in Green et al. v. Campbell et al., 187 Okla. 54, 100 P. 2d 997, in an opinion by Justice Hurst, said:

> "An interest in tax-exempt lands, inherited by a one-half blood citizen of the Chickasha Tribe of Indians, is subject to the restrictions imposed by Section I of

the Act of Congress of January 27, 1933, 47 Stat. 777, and may not be alienated except as provided by acts of Congress."

Plaintiffs in error have called to our attention the case of Brown et al. v. Stufflebean et al., 187 Fed. 2d 347, which they contend is decisive of the case at bar. Defendants in error insist that the above case does not depart from the court's pronouncement in Glenn v. Lewis, (10 Cir.) 105 Fed. 2d 398, and other supporting decisions.

We find factual differences in Brown v. Stufflebean from the case at bar, although we think they are not opposite in legal conclusion. In Stufflebean, the allottee was a full-blood restricted Indian who died intestate in 1940, seized of restricted tax-exempt land. The heirs were a non-Indian husband four full-blood Indian children and two half-blood Indian grandchildren. It thus appears that one of the allottee's heirs was not of Indian blood.

Clearly, the "entire interest" in the allottee's land was not inherited by restricted Indians and, therefore, the requirement of section 1 of the 1933 Act, supra, as construed in Glenn v. Lewis, supra, and like decisions, was not met. Our reading of the Stufflebean case does not lead us to a conclusion that the decision departs from the previous construction uniformly applied to the Act.

The present appeal presents the following questions:

"(1) If members of the Five Civilized Tribes dies possessing an undivided interest in restricted and tax-exempt lands, does Section 1 of the 1933 Act apply where the 'entire interest' of that ancestor is inherited by restricted Indians, namely, Indians of one-half degree or more of Indian blood, including full-bloods?

"(2) Does said Act apply to a 'second inheritance'?"

As we have seen, Sallie Lowman's allotment here involved was tax-exempt and restricted. At her death in November, 1933, all of her heirs were restricted Indians and

the "entire interest" of the allottee was acquired by them. It follows that their respective inherited interest in the lands "remained restricted and tax-exempt." This being true, the conveyance made by one of the heirs of the allottee of his separate interest requires the approval of the Secretary of the Interior or Oklahoma county court.

We, therefore, hold that when Sallie Lowman died intestate, subsequent to the effective date of the Act of January 27, 1933, 47 Stat. L. 777, she then being seized of land tax-exempt and restricted, that the undivided 1/6th interest in the land by devolution vested in Louisa Taylor Winship, her daughter, a full-blood Choctaw Indian. Louisa died intestate in August, 1937, leaving as her sole heirs, her husband, Louie Winship, a 3/4ths blood Choctaw Indian, and her daughter, Flora, a 7/8ths blood Choctaw Indian. Thus Louie and Flora inherited the "entire interest" of Louisa each receiving an undivided 1/12th interest restricted and tax-exempt, in and to the lands which Louisa had inherited from her mother, Sallie Lowman, the allottee of said land.

We think that a reasonable construction of the Act leads ot the conclusion that Congress intended that it apply to a "second inheritance." It seems reasonable to assume that Congress was equally solicitous in the protection of the second devolution where each inheritor was an Indian of one-half degree or more of Indian blood.

Louie's title to the land which he inherited from his wife, Louisa, could not, under the first proviso of Section I of the Act, be conveyed by him without the approval of the Secretary of Interior, or Oklahoma County Court, and, therefore, the judgment below canceling the deed executed by Louie to Louise Smalling, was proper.

Judgment affirmed.

This Court acknowledges the services of Attorneys A. S. Wells, A. C. Kidd, and Dudley Culp, who, as Special Masters, aided in the preparation of this opinion. These attorneys were recommended by the Oklahoma Bar Associa-

tion, approved by the Judicial Council, and appointed by the Court.

Halley, C. J., Corn, Davison, Arnold, and O'Neal, JJ., concur. Johnson, V. C. J., and Blackbird, J., dissent.

In the
SUPREME COURT OF THE STATE OF OKLAHOMA.
Filed November 8, 1955.

The Clerk is hereby directed to issue the following orders:

34,516—K. O. Gates, et al., v. Rex F. Curry, et al. Former opinion promulgated March 31, 1953, withdrawn and substitute opinion this day adopted.

N. B. Johnson, Chief Justice.

(Filed in Supreme Court of Oklahoma, Nov. 8, 1955; Andy Payne, Clerk.)

In the
SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 34,516

K. O. Gates and Louise Smalling, Plaintiffs in Error,

vs.

Rex F. Curry, The Carter Oil Company, and C. E. McCaughey, Defendants in Error.

SYLLABUS.

Where, subsequent to the effective date of the Act of Congress of January 27, 1933 (47 Stat. 777), a full blood allottee member of one of the Five Civilized Tribes of Indians died seized of a portion of her restricted and tax-exempt allotment, after her surviving full blood husband's and one daughter's conveyance of their inherited interest in said allotment to a white man in 1934, and the death of another daughter in 1937, the latter's inherited interest in the same allotment, under said Act and prior to the Act of

August 4, 1947 (61 Stat. 731), was free of all restrictions in the hands of her adult Indian heirs.

Appeal from the District Court of Garvin County; Hon. Ben T. Williams, Judge.

Suit by Rex F. Curry, plaintiff, against Louise Smalling, K. O. Gates and Louie Winship, defendants, and C. E. McCaughey and The Carter Oil Company, additional parties, to quiet title to an undivided one-twelfth interest, inherited by Winship through the death of his full blood Choctaw Indian wife, in the restricted and tax-exempt allotment of Winship's mother-in-law. From a judgment for plaintiff and the above named additional parties, the defendants, Smalling and Gates, appeal.

Reversed and remanded with directions.

Chas. L. Orr, Oklahoma City, T. H. Ottesen, Sulphur, for Plaintiffs in Error; Garvin & Shumate, Pauls Valley, for Defendant in Error, Rex F. Curry; Curtis & Blanton, Pauls Valley, Forrest M. Darrough, Walter Davison, and Varley H. Taylor, Tulsa, for Defendant in Error, The Carter Oil Company; Brown & Verity, Oklahoma City, for Defendant in Error, C. E. McCaughey; Orel Busby, and Harrell & Trice, Ada, Woodford & Ballinger, Warren & Warren, C. H. Baskin, James W. Rogers, James W. Rogers, Jr., Bob Rives, and James B. Sandlin, Holdenville, W. M. Haulsee, Wewoka, Stanley Cunningham, Tishomingo, I. O. Correll, Atoka, I. C. Saunders, Shawnee, Payl & McPheron, Durant, Haskell Paul, Pauls Valley, R. M. Mountcastle, Muskogee, W. F. Semple, Tulsa, H. A. Ledbetter, Ardmore, Attorneys Amici Curiae.

[OPINION.]

Blackbird, J: The plaintiff, Rex F. Curry, brought this suit to quiet his title to an undivided interest in a 140-acre tract of land in Garvin County, Oklahoma, as against the claim of title to an undivided one-twelfth interest therein asserted by the defendants Louise Smalling (claiming ownership), and K. O. Gates (claiming an equity), and Louie

Winship (Louise Smalling's grantor). Because the latter was a three-quarter blood Choctaw Indian, the United States was made a party defendant. The defendants, Gates and Smalling, filed an answer and cross-petition containing allegations which necessitated the trial court's order making C. E. McCaughey and The Carter Oil Company, a corporation, additional parties. The Government elected not to remove the cause to the Federal Court and the defendant, Winship, defaulted. Judgment was for Curry, McCaughey and The Carter Oil Company. The defendants Gates and Smalling appeal. The parties will be referred to as they appeared in the trial court. The facts, established by stipulation and exhibits, present for determination the applicability, and effect thereon, of the proviso in Sec. 1 of the Act of Congress of January 27, 1933 (47 Stat. L. 777), which reads as follows:

> "Provided, that where the *entire interest* in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift or purchase, with restricted funds by or for restricted Indians, *such lands* shall remain restricted and tax-exempt during the life of *and as long as held* by such restricted Indians, but no longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law; * * *." (Emphasis ours.)

The relevant undisputed facts, as shown by the parties' stipulation, are substantially as hereinafter set forth: The land interest involved was a part of the allotment of Sallie Lowman, a full blood and restricted member of the Choctaw Tribe of Indians. Said allotment was tax-exempt, having been certified as such in accord with the Act of Congress of May 10th, 1928 (45 Stat. L. 492). The allottee died intestate on November 3rd, 1933, leaving as surviving heirs at law, a second husband, Willy Battiest, daughters, Catherine and Louisa Taylor, and three other adult heirs, each of whom was a full blood Choctaw, and inherited an undivided one-sixth interest in said decedent's allotment.

On February 8, 1934, the surviving husband, Willy, and daughter, Catherine, conveyed their composite one-third undivided interest by court approved warranty deed, to K. O. Gates, who was not of Indian blood. (Said interest thereupon became unrestricted and taxable.)

Subsequently, on August 22, 1937, the other above-named daughter, Louisa Taylor, then Winship, while still seized of her undivided one-sixth interest in the Sallie Lowman allotment, died, leaving said interest in equal shares of an undivided one-twelfth each, to her three-quarter blood Choctaw Indan husband, the defendant Louie Winship, and her seven-eighths blood Choctaw daughter, Flora May Winship.

The only interest in the Sallie Lowman allotment involved here is the above-mentioned undivided one-twelfth interest Louie Winship inherited, as aforesaid, through his wife, the allottee's daughter. Louise Smalling claims this interest through a warranty deed dated June 6, 1940, Winship purported executed and delivered to her. This deed was never approved by the county court. Plaintiff claims title to the same interest through a deed dated November 12, 1946, executed by Winship, and approved by the county court. McCaughey's claim is based upon a subsequent mineral conveyance from plaintiff. The Carter Oil Company claims by assignment an oil and gas lease covering said interest executed by Winship, more than a month previously, and approved by the county court.

Whether the trial court correctly upheld the claimed rights and title of plaintiff, McCaughey, and The Carter Oil Company, instead of the claimed rights and title of Louise Smalling and K. O. Gates, to the one-twelfth interest in the Sallie Lowman allotment Winship inherited through his wife, as aforesaid, depends upon whether said interest, at the time he executed the deed to Louise Smalling, was restricted. This question in turn hinges upon the proper interpretation of the above-quoted proviso of the 1933 Congressional Act, supra. The correct meaning of the term

"entire interest," as used in the quoted proviso could furnish a key to the solution of the question herein presented. If Congress had specifically spelled out what it intended by the use of this term, then one of the questions in our consideration of this case would not have arisen, namely: Does the term apply to the entire interest of which Sallie Lowman died seized, so that when, after Willy's and Catherine's conveyance to the white man, Gates, it could no longer be said to be "held by" restricted Indians—or—does it mean, or apply to, all of the various inherited interests and operate to restrict each *during the life of* and as long as held by its restricted inheritor? One argument in support of the latter view is indicated by the use of the word "and," rather than the word "or," in the phrases: "during the life of *and* as long as held by such restricted Indians * * *." It is not necessary, however, to resolve the stated question here. Under either view, the only interest here involved—that of Louisa Taylor then Winship—was unrestricted, when, after her death, her surviving husband, Louie, executed his *first* deed to his inherited part thereof. With reference to this and related matters see Brown v. Stufflebean, (U. S. C. A., 10th Cir.) 187 Fed. 2d 347; Glenn v. Lewis, (U. S. C. A., 10th Cir.) 105 Fed. 2d 398; U. S. v. Easley, (D. C., E. D., Okla.) 33 Fed. Supp. 442; U. S. v. Watashe, (U. S. C A., 10th Cir.) 117 Fed. 2d 947.

It appears from defendants' argument herein that they would apply said Act only to what they refer to as the "second inheritance." This would restrict the Louisa Taylor interest *after her death* and during the life of, and as long as held by her restricted Indian successors. In this connection see cases cited, supra. Such suspension of the operation of the Act would have the effect of giving it a much broader coverage or application than is indicated by its wording. From the effective date of the Act of May 27th, 1908 (35 Stat. 312), down to the effective date of said 1933 Act, there were no restrictions on the alienation of lands inherited by adult heirs of less than full blood (U. S. v. Watashe, supra, p. 948); but the interpretation of said

Act contended for would enlarge the 1933 Act's re-imposition of restrictions to include those Five Civilized Tribes' members with degrees of blood ranging from one-half to full, by extending the restrictions on inherited interests, through an indefinite number of devolutions, into the hands of innumerable succeeding generations; for, if the operation of the Act could be logically withheld until the "second inheritance," why could it not be made applicable also to the third, fourth, etc.? We think that if Congress had ever intended, by its passage of the 1933 Act, to effect any such far-reaching "re-imposition" of a restriction (which at that time did not exist) it would have inserted in said Act appropriate language to so indicate. Nor do we think this conclusion as to Congress' intention at that time is affected by the intention it subsequently expressed in the Act of August 4th, 1947 (61 Stat. 731). As said in Brown v. Stufflebean, supra, the latter Act is "not a construction of the 1933 Act." The 1947 Act can have no proper bearing upon the question here involved, and, as pointed out in the cited case, the latter Act was not retroactive.

In accord with our conclusion that at the time of its first conveyance the Louie Winship interest was unrestricted, the judgment of the trial court is reversed and this cause is remanded with directions to enter judgment for the defendants, Louise Smalley and K. O. Gates.

Johnson, C. J., Welch, Davison and Jackson, JJ: concur. Corn, and Halley, JJ: dissent.

(Filed in Supreme Court of Oklahoma, Sep. 18, 1956; Andy Payne, Clerk.)

In the
SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 34,516

K. O. Gates and Louise Smalling, Plaintiffs in Error,
vs.
Rex F. Curry, The Carter Oil Company, and C. E. McCaughey,
Defendants in Error.

ORDER CORRECTING OPINION.

Now on this 17th day of September, 1956, it is hereby ordered that the opinion in the above styled cause promulgated November 8, 1955, be, and the same is hereby corrected in the following particulars, to-wit:

That on page 4 of the typewritten opinion in the eighth line from the bottom of said page beginning with the sentence "If Congress had specifically," etc., and continuing to the end of the opinion be eliminated and the following matter consisting of four paragraphs be substituted in lieu thereof:

> "Prior to Sallie Loman's death she fully owned this tract of land and it was restricted and tax-exempt. When she died the entire interest in the tract of land was inherited by restricted Indians and held by restricted Indians and therefore they held it subject to restrictions, and tax exempt, by reason of the above quoted Congressional Act; that is, because the entire interest was inherited by and held by restricted Indians, each of said heirs held his or her inherited interest subject to such restrictions and tax exempt. So it was that Louisa Taylor acquired and held her one-sixth interest in this tract of land subject to such restrictions, and tax exempt.
>
> "But as above pointed out, we are here concerned only with the applicability of the quoted Act to the inheritance by Louie Winship of a one-twelfth interest in the tract of land involved. At that time the entire interest in this tract of land was not owned or held by restricted Indians as pointed out in the above fact statement. It therefore must be apparent that the facts do not bring this Louie Winship inheritance under the provisions of the quoted Act, and that inherited interest was not restricted by the provisions of that Act when, after his wife Louisa died, he Louie executed his first deed to his inherited part of this tract of land. With reference to this and related matters, see Brown v. Stuflebean, (USCA 10th Cir.) 187 Fed. 2d 347; Glenn v.

Lewis, (USCA 10th Cir.) 105 Fed. 2d 398; U. S. v. Easley, (D. C. E. D. Okla.) 33 Fed. Supp. 442; U. S. v Watashe, (USCA 10th Cir.) 117 Fed. 2d 947.

"Nor do we think this conclusion is affected by the subsequent Act of August 4th, 1947 (61 Stat. 731). As said in Brown v. Stufflebean, supra, the latter Act is 'not a construction of the 1933 Act.' The 1947 Act can have no proper bearing upon the question here involved, and, as pointed out in the cited case, the latter Act was not retroactive.

"In accord with our conclusion that at the time of its first conveyance the Louie Winship interest was unrestricted, the judgment of the trial court is reversed, and this cause is remanded with directions to enter judgment for the defendants, Louise Smalley and K. O. Gates."

Done by order of the Court in Conference this 17th day of September, 1956.

N. B. Johnson, Chief Justice.

OPINION ENTERED NOVEMBER 8, 1955,
As Corrected by Order Entered on September 18, 1956.

In the
SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 34,516

K. O. Gates and Louise Smalling, Plaintiffs in Error,

vs.

Rex F. Curry, The Carter Oil Company, and C. E. McCaughey, Defendants in Error.

SYLLABUS.

Where, subsequent to the effective date of the Act of Congress of January 27, 1933 (47 Stat. 777), a full blood allottee member of one of the Five Civilized Tribes of Indians died seized of a portion of her restricted and tax-

exempt allotment, after her surviving full blood husband's and one daughter's conveyance of their inherited interest in said allotment to a white man in 1934, and the death of another daughter in 1937, the latter's inherited interest in the same allotment, under said Act and prior to the Act of August 4, 1947 (61 Stat. 731), was free of all restrictions in the hands of her adult Indian heirs.

Appeal from the District Court of Garvin County, Hon. Ben T. Williams, Judge.

Suit by Rex F. Curry, plaintiff, against Louise Smalling, K. O. Gates and Louie Winship, defendants, and C. E. McCaughey and The Carter Oil Company, additional parties, to quiet title to an undivided one-twelfth interest, inherited by Winship through the death of his full blood Choctaw Indian wife, in the restricted and tax-exempt allotment of Winship's mother-in-law. From a judgment for plaintiff and the above named additional parties, the defendants, Smalling and Gates, appeal.

Reversed and remanded with directions.

(Names of attorneys omitted.)

[OPINION.]

Blackbird, J: The plaintiff, Rex F. Curry, brought this suit to quiet his title to an undivided interest in a 140-acre tract of land in Garvin County, Oklahoma, as against the claim of title to an undivided one-twelfth interest therein asserted by the defendants Louise Smalling (claiming ownership), and K. O. Gates (claiming an equity), and Louie Winship (Louise Smalling's grantor). Because the latter was a three-quarter blood Choctaw Indian, the United States was made a party defendant. The defendants, Gates and Smalling, filed an answer and cross-petition containing allegations which necessitated the trial court's order making C. E. McCaughey and The Carter Oil Company, a corporation, additional parties. The Government elected not to remove the cause to the Federal Court and the defendant, Winship, defaulted. Judgment was for Curry, McCaughey

and The Carter Oil Company. The defendants Gates and Smalling appeal. The parties will be referred to as they appeared in the trial court. The facts, established by stipulation and exhibits, present for determination the applicability, and effect thereon, of the proviso in Sec. 1 of the Act of Congress of January 27, 1933 (47 Stat. L. 777), which reads as follows:

> "Provided, that where the *entire interest* in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift or purchase, with restricted funds by or for restricted Indians, *such lands* shall remain restricted and tax-exempt during the life of *and as long as held* by such restricted Indians, but no longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law; * * *" (Emphasis ours.)

The relevant undisputed facts, as shown by the parties' stipulation, are substantially as hereinafter set forth: The land interest involved was a part of the allotment of Sallie Lowman, a full blood and restricted member of the Choctaw Tribe of Indians. Said allotment was tax-exempt, having been certified as such in accord with the Act of Congress of May 10th, 1928 (45 Stat. L. 492). The allottee died intestate on November 3rd, 1933, leaving as surviving heirs at law, a second husband, Willy Battiest, daughters, Catherine and Louisa Taylor, and three other adult heirs, each of whom was a full blood Choctaw, and inherited an undivided one-sixth interest in said decedent's allotment.

On February 8, 1934, the surviving husband, Willy, and daughter, Catherine, conveyed their composite one-third undivided interest by court approved warranty deed, to K. O. Gates, who was not of Indian blood. (Said interest thereupon became unrestricted and taxable.)

Subsequently, on August 22, 1937, the other above-named daughter, Louisa Taylor, then Winship, while still seized of her undivided one-sixth interest in the Sallie Low-

man allotment, died, leaving said interest in equal shares, of an undivided one-twelfth each, to her three-quarter blood Choctaw Indian husband, the defendant Louie Winship,, and her seven-eighths blood Choctaw daughter, Flora May Winship.

The only interest in the Sallie Lowman allotment involved here is the above-mentioned undivided one-twelfth interest Louie Winship inherited, as aforesaid, through his wife, the allottee's daughter. Louise Smalling claims this interest through a warranty deed dated June 6, 1940, Winship purportedy executed and deivered to her. This deed was never approved by the county court. Plaintiff claims title to the same interest through a deed dated November 12, 1946, executed by Winship, and approved by the county court. McCaughey's claim is based upon a subsequent mineral conveyance from plaintiff. The Carter Oil Company claims by assignment an oil and gas lease covering said interest executed by Winship, more than a month previously, and approved by the county court.

Whether the trial court correctly upheld the claimed rights and title of plaintiff, McCaughey, and The Carter Oil Company, instead of the claimed rights and title of Louise Smalling and K. O. Gates, to the one-twelfth interest in the Sallie Lowman allotment Winship inherited through his wife, as aforesaid, depends upon whether said interest, at the time he executed the deed to Louise Smalling, was restricted. This question in turn hinges upon the proper interpretation of the above-quoted proviso of the 1933 Congessional Act, supra. The correct meaning of the term "entire interest," as used in the quoted proviso could furnish a key to the solution of the question herein presented.

*Prior to Sallie Loman's death she fully owned this tract of land and it was restricted and tax-exempt. When she died the entire interest in the tract of land was inherited by restricted Indians and held by restricted Indians and therefore

*Beginning of substituted text in accordance with Order Correcting Opinion entered September 18, 1956.

they held it subject to restrictions, and tax exempt, by reason of the above quoted Congressional Act; that is, because the entire interest was inherited by and held by restricted Indians, each of said heirs held his or her inherited interest subject to such restrictions and tax exempt. So it was that Louisa Taylor acquired and held her one-sixth interest in this tract of land subject to such restrictions, and tax exempt.

But as above pointed out, we are here concerned only with the applicability of the quoted Act to the inheritance by Louie Winship of a one-twelfth interest in the tract of land involved. At that time the entire interest in this tract of land was not owned or held by restricted Indians as pointed out in the above fact statement. It therefore must be apparent that the facts do not bring this Louie Winship inheritance under the provisions of the quoted Act, and that inherited interest was not restricted by the provisions of that Act when after his wife Louisa died, he Louie executed his first deed to his inherited part of this tract of land. With reference to this and related matters, see Brown v. Stufflebean, (USCA, 10th Cir.) 187 Fed. 2d 347; Glenn v. Lewis, (USCA, 10th Cir.) 105 Fed. 2d 398; U. S. v. Easley, (D. C. E. D. Okla.) 33 Fed. Supp. 442; U. S. v. Watashe, (USCA, 10th Cir.) 117 Fed. 2d 947.

Nor do we think this conclusion is affected by the subsequent Act of August 4th, 1947 (61 Stat. 731). As said in Brown v. Stufflebean, supra, the latter Act is "not a construction of the 1933 Act." The 1947 Act can have no proper bearing upon the question here involved, and, as pointed out in the cited case, the latter Act was not retroactive.

In accord with our conclusion that at the time of its first conveyance the Louie Winship interest was unrestricted, the judgment of the trial court is reversed, and this cause is remanded with directions to enter judgment for the defendants, Louise Smalley and K. O. Gates.

Johnson, C. J., and Welch, Davison and Jackson, J. J., concur. Corn and Halley, J. J., dissent.

Appendix C.

IN THE DISTRICT COURT OF GARVIN COUNTY, STATE OF OKLAHOMA.

No. 15071

Rex F. Curry, Plaintiff,

v.

Louie Winship, et al., Defendants.

STIPULATION.

It is stipulated and agreed by and between the parties to this action that:

1.

Sallie Lowman was enrolled as a full blood Choctaw Indian opposite Roll No. 2743 and received as a portion of her allotment the following described lands situate in Garvin County, State of Oklahoma, to-wit:

North Half of Southeast Quarter of Southwest Quarter (N2 SE4 SW4), and South Half of Southeast Quarter (S2 SE4) and South Half of North Half of Southeast Quarter (S2 N2 SE4) of Section 23, Township 2 North, Range 2 West.

2.

That said Sallie Lowman was a restricted full blood Choctaw Indian and that the above described land involved herein was designated as tax exempt by a Certificate of Tax Exemption, dated May 27, 1930, issued during the lifetime of said Sallie Lowman pursuant to Section 4 of the Act of Congress of May 10, 1928 (Public law 360, 70th Congress), and filed in the office of the Superintendent of the Five Civilized Tribes, which said Certificate was filed for record in the Office of the County Clerk of Garvin County, Oklahoma, on August 5, 1930, and recorded in Book 172 at page 437. That no other Certificate of Tax Exemption was issued or filed covering said land.

3.

That said Sallie Lowman died intestate on November 3, 1933, while domiciled and residing in McCurtain County,

Oklahoma, and while still seized and possessed of the lands above described.

4.

That upon the death of the said Sallie Lowman as aforesaid, she left to survive her as her sole and only heirs at law the following named persons who inherited the above described lands in the proportions set opposite their names, to-wit:

Willy Battiest, surviving second husband, full blood Choctaw Indian, enrolled opposite Roll No. 1001—an undivided One-Sixth (1/6th) interest;

Louisa Taylor, now Winship, daughter, full blood Choctaw Indian, not enrolled—an undivided One-Sixth (1/6th) interest;

Catherine Taylor, now Battiest, daughter, full blood Choctaw Indian, not enrolled—an undivided One-Sixth (1/6th) interest;

Marcus Battiest, son, full blood Choctaw Indian, not enrolled—an undivided One-Sixth (1/6th) interest;

Sarah Lina Battiest, daughter, full blood Choctaw Indian, not enrolled—an undivided One-Sixth (1/6th) interest;

Calvin Battiest, son, full blood Choctaw Indian, not enrolled—an undivided One-Sixth (1/6th) interest.

That the heirship of the said Sallie Lowman, deceased, was duly determined as aforesaid by the County Court of McCurtain County, State of Oklahoma, in Cause No. 4349 in said Court, by Order and Decree entered in said Cause on June 21, 1945.

5.

That on the 8th day of February, 1934, the said Willy Battiest and Catherine Taylor, now Battiest, for a good and valuable consideration made, executed and delivered to K. O. Gates their Warranty Deed conveying an undivided One-Third (1/3rd) interest in and to said land, which said deed was, on February 8, 1934, approved by the County

Court of McCurtain County, Oklahoma, and is recorded in the office of the County Clerk of Garvin County, Oklahoma, in Book 45 of Deeds at page 391; that thereafter the said K. O. Gates sold and conveyed said interest in said land to E. A. McConnell and Sam Muse and that said grantees are not restricted Indians or of any Indian blood.

6.

That Louisa Taylor, now Winship, who had inherited an undivided One-Sixth (1/6th) interest in said land, as aforesaid, died intestate August 22, 1937, while seized and possessed of said undivided One-Sixth (1/6th) interest and left to survive her as her sole and only heirs her husband, Louie Winship, an adult three-fourths blood Choctaw Indian, not enrolled, and her daughter, Flora May Winship, a seven-eighths blood Choctaw Indian, not enrolled, who inherited in equal share said undivided One-Sixth (1/6th) interest of the said Louisa Taylor, now Winship, in and to said land. That the heirship of the said Louisa Taylor, now Winship, was duly determined as aforesaid by the County Court of McCurtain County, Oklahoma, in Cause No. 4349, by Order and Decree entered therein on June 21, 1945.

7.

It is further stipulated and agreed that from and after the sale in 1934 of the undivided One-Third (1/3rd) interest of said land by Willy Battiest and Catherine Taylor, now Battiest, as aforesaid, said undivided One-Third (1/3rd) interest so sold and conveyed became taxable and that said One-Third (1/3rd) interest in said land was neither tax exempt nor restricted when Louisa Taylor, now Winship, died in 1937.

8.

That there appears in Book 242 at page 601 of the records of the County Clerk of Garvin County, Oklahoma, a Warranty Deed, dated June 6, 1940, filed for record on December 26, 1944, at 8:00 o'clock A. M., upon which Deed defendant Louie Winship and one Leo Winship appear as grantors and defendant Louise Smalling appears thereon

as grantee, which said Deed purports to convey all of the undivided interest in said grantors in the lands above described involved in this action, together with other lands located in Carter and McCurtain Counties, Oklahoma. It is specifically stipulated that plaintiff Rex F. Curry and defendant The Carter Oil Company, as particularly set forth in pleadings filed in this action by said Plaintiff Rex F. Curry and defendant The Carter Oil Company, each denies the sufficiency or validity of said Deed and each asserts that defendants Louise Smalling and K. O. Gates acquired no right, title or interest in said lands by reason of said Deed.

9.

That thereafter, to-wit, on the 15th day of July, 1946, the said Louie Winship, for valuable consideration, made, executed and delivered to L. S. Youngblood an Oil and Gas Lease covering his undivided interest in said land for a term of ten years and so long thereafter as oil or gas may be produced, which said Lease was duly approved by the County Court of McCurtain County, Oklahoma, in Probate Cause No. 4244, on September 18, 1946, and is recorded in the Office of the County Clerk of Garvin County, Oklahoma, in Book 265 at page 54. That on April 4, 1947, the said L. S. Youngblood assigned said Lease to defendant The Carter Oil Company and said Assignment is recorded in the Office of the County Clerk of Garvin County, Oklahoma, in Book 273 at page 425.

10.

That on November 12, 1946, the said Louie Winship made, executed and acknowledged his certain Warranty Deed to plaintiff Rex F. Curry covering his undivided One-Twelfth (1/12th) interest in and to said land, which Deed was duly approved by the County Court of McCurtain County, Oklahoma, on November 27, 1946, and upon said approval, the said Warranty Deed was delivered to the grantee therein, plaintiff Rex F. Curry, who paid the approved consideration therefor. That said Deed was filed for record in the Office of the County Clerk of Garvin County, Okla-

homa, on December 19, 1946, and now appears of record in Deed Record 61 at page 512. That thereafter the plaintiff conveyed to I. M. Dunn an undivided One-Eighth (1/8th) interest of the undivided One-Twelfth (1/12th) interest in and to the oil and gas and other minerals acquired by plaintiff by virtue of the Deed executed by the said Louie Winship, which said Mineral Deed is recorded in the Office of the County Clerk of Garvin County, Oklahoma, in Mineral Deed Record 10 at page 520 and that thereafter on the 24th day of March, 1947, the said I. M. Dunn conveyed to C. E. McCaughey the mineral interest conveyed to him by the plaintiff as aforesaid, which said Mineral Deed is recorded in the Office of the County Clerk of Garvin County, Oklahoma, in Mineral Deed Record 10 at page 537.

11.

That this action involves the One-Twelfth (1/12th) interest in said land inherited by Louie Winship from his deceased wife, Louisa Taylor, now Winship, and that all parties claiming to own same, or an interest therein, are parties to this action.

12.

It is further stipulated and agreed that any party hereto may introduce any further competent or relevant testimony which does not contradict the above and foregoing stipulated facts.

(Names and signatures of parties to Stipulation omitted. See R. 62-68.)

FILED
JAN 9 1957
JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 628

REX F. CURRY, THE CARTER OIL COMPANY, a corporation, and C. E. McCAUGHEY,
Petitioners,

VERSUS

K. O. GATES and LOUISE E. SMALLING,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

BRIEF FOR RESPONDENTS IN OPPOSITION

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Counsel for Respondents.

Counsel of Record:

J. H. OTTESEN,
Sulphur, Oklahoma,

January, 1957.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8780

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OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reported in 301 P.2d 659.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the proviso of Section 1 of the Act of January 27, 1933, restricts and exempts from taxation a fractional interest acquired by inheritance by a three-fourths

blood Choctaw Indian when the entire interest in the land was not then restricted and tax-exempt.

STATUTE INVOLVED

The proviso to Section 1 of the Act of January 27, 1933 (47 Stat. L. 777), as set forth in the petition at page 13 is the statute involved.

STATEMENT

The action involves the title to a 1/12th interest in a portion of the allotment of Sallie Lowman, deceased, a full-blood Choctaw Indian.

The allottee died November 3, 1933, leaving surviving a second husband, enrolled as a full-blood Choctaw Indian, and five children, unenrolled full-blood Indians, who inherited the land in equal shares.

In 1934, two of the heirs conveyed their interest and their 1/3rd interest became unrestricted and taxable.

Thereafter in 1937, Louisa Winship, daughter of the allottee, died intestate and left as her heirs her husband Louie Winship, unenrolled 3/4ths-blood Indian and an unenrolled 7/8ths-blood Indian daughter, who inherited her 1/6th interest in the land in equal shares.

The title to the 1/12th interest so inherited by Louie Winship is the property involved in the action. Louie Winship first conveyed this interest to respondents and thereafter conveyed same to petitioners. The conveyance to respondents was not approved by the Secretary of the In-

terior or the County Court. The conveyances to petitioners were approved by the County Court.

It was the contention of petitioners that the alienation of this fractional interest was restricted by the first proviso of Section 1 of the Act of Congress, approved January 27, 1933 (47 Stat. L. 777), and that the unapproved conveyance to respondents was void.

Louie Winship was a party to the action, but defaulted and took no position. The Secretary of the Interior was duly served but declined to remove the cause to the federal court, or to participate in the action.

The Supreme Court of Oklahoma held that the Act of 1933 did not apply, because the entire interest in the tract of land was not restricted and tax-exempt as required by the Act when Louie Winship acquired the interest in question, and that the conveyance of respondents was valid.

ARGUMENT

The issue in the present case is purely a private controversy between grantees of a three-fourths blood Choctaw Indian of a fractional interest in a tract of land. The Act in question was repealed and the question involved has become academic. Respondents assert that the petition herein should be denied because:

I.

The Act in question was repealed and its construction is no longer a question of public importance.

II.

The decision is correct and is in accord with the administrative construction of the Act.

III.

There is no conflict of decisions and the opinion of the Supreme Court of Oklahoma is supported by all reported cases.

I.

The Act in question was repealed and its construction is no longer a question of public importance.

The Act in question was expressly repealed by Section 12 of the Act of Congress, approved August 4, 1947, Stat. L. 731, and its construction is not a live question of public importance.

Petitioners do not point out any conflict in the decisions construing the Act, but assert in their petition that there are no reported cases involving the identical factual situation. Apparently the question herein has become academic, except as to the parties to this action. There are no Indians involved in the action and the Secretary of the Interior declined to participate or take any position therein.

This is a private controversy between petitioners and respondents. It involves only a fractional interest in an Indian allotment and is not of sufficient importance to require a review by this Court.

Respondents respectfully submit that the application for a writ of certiorari should be denied because it presents no substantial federal question.

II.

The decision is correct and is in accord with the administrative construction of the Act.

The Supreme Court of Oklahoma correctly held that the Act in question did not restrict and exempt from taxation the interest inherited by Louie Winship in this action. The language used by Congress in the proviso was clear and unambiguous. The Act plainly specifies and prescribes with precision the lands which Congress intended should remain restricted and tax-exempt. It also clearly and plainly limited the duration of the restrictions imposed.

The proviso is as follows:

> "Provided, that where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and so long as held by such restricted Indians, but no longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law."

The subject matter of the proviso is "restricted and tax-exempt land", and the requirement is that the entire interest in the "tract" be acquired by "restricted Indians." Congress, by the use of the words "entire interest" in any tract of restricted and tax-exempt land, surely did not mean a fractional interest or less than the whole tract of land be involved in the acquisition. There should be no doubt regarding the meaning of the words "the entire interest in any tract of restricted and tax-exempt land belonging to

members of the Five Civilized Tribes." Obviously, by these words Congress required that the entire tract of land rather than an undivided interest of an ancestor should be restricted, tax-exempt and belong to members of the Five Civilized Tribes when acquired by restricted Indians before the proviso should apply.

This is the construction of the Act placed upon it by its administrators and by the federal courts. The Indian Department, since its enactment, has construed the Act to apply only where the entire interest in the tract is restricted and tax-exempt and acquired in the manner prescribed. The Solicitor of the Interior Department, shortly after its enactment, wrote an opinion which was approved by the Secretary of the Interior in 1934. See 54 Interior Decisions 382. In that opinion the Solicitor said:

> "The declaration that such land shall remain restricted and tax-exempt where the entire interest therein is acquired by restricted Indians, can, therefore, have no other meaning than that the existing restrictions in whatever form they may be are preserved. Subject, of course, to the limitation that no one person can hold in excess of 160 acres of tax-exempt land, it follows that restricted tax-exempt allotments, the entire interest in which is acquired by an Indian of the Five Civilized Tribes of one half or more Indian blood, or by any group of such Indians, comes to such Indian or Indians in the same condition and subject to the same restrictions resting upon the land in the hands of the allottee. In other words, the existing restrictions prohibiting alienation or encumbrance unless the restrictions be removed by the Secretary of the Interior run with the land and bind it for the time stated in the hands of such restricted Indian or Indians. The

same rule applies with respect to the second class of restricted and tax-exempt lands, *i.e.* lands belonging to full blood heirs or devisees. Indians of the Five Civilized Tribes of one-half or more Indian blood who acquire the entire interest in such lands are bound by the same restrictions existing upon the full blood heirs or devisees, namely that they cannot convey the same without the approval of the proper local court."

Regulations were promulgated by the Secretary of the Interior in 1938, governing the leasing of restricted lands belonging to the members of the Five Civilized Tribes for oil and gas mining purposes. These regulations were filed and recorded in a Federal Register, May 4, 1948. See 3 Federal Register, pp. 877-884. Section 45 of these regulations, which deals with lands restricted by the Act of 1933, provides:

"Sec. 45. Restrictions Especially Continued As To Certain Lands.—Restricted lands allotted as either homestead or surplus allotments, designated as tax-exempt under section 4 of the Act of May 10, 1928, as amended May 24, 1928 (45 Stat. 495-733) the entire interest in which was acquired by inheritance, gift, devise, or purchase with restricted funds, by persons of one-half or more Indian blood, after the passage of the Act of January 27, 1933 (47 Stat. 777) continue to be restricted under the provisions of the last mentioned Act and oil and gas leases thereof are subject to these regulations and all such leases to be valid must be approved by the Secretary of the Interior * * *."

Nowhere in these regulations is there any provision regarding the leasing of fractional interests acquired by inheritance by Indians of half or more Indian blood from an Indian heir. The lack of any such regulation is rather

convincing evidence that such an interest as was involved herein was not considered by the Department to be restricted by the Act.

These administrative interpretations of the statute involved are entitled to weight in construing same and determining their meaning. *United States, et al.* v. *American Trucking Association*, 310 U.S. 534, 84 L. Ed. 1345.

III.

There is no conflict of decisions and the opinion of the Supreme Court of Oklahoma is supported by all reported cases.

While there have been no cases involving the identical factual situation, the federal courts have held that the entire interest in the land must be acquired by restricted Indians before the proviso applies.

In *Kirby* v. *Parker*, 58 F. Supp. 309, a full-blood allottee left a quarter-blood Indian wife and two 7/8ths-blood children. The United States District Court for the Eastern District of Oklahoma found that "the entire interest in said land was not acquired by inheritance by restricted Indians as Salina Parker is only a quarter-blood Indian." And held: "If any heir inherits an interest in tax-exempt lands held by an allottee of the Five Civilized Tribes is less than half-blood the lands do not remain restricted." The rule announced in that case is applicable in the case at bar. If the entire interest in the tract must be acquired by restricted Indians for the proviso to apply, the proviso cannot be applied in the case at bar.

Petitioners cite no case, and there are none, holding that the proviso should be applied where the entire interest

of the ancestor rather than the entire interest in the tract is inherited by Indians of the restricted class. All reported cases have uniformly held that the entire interest in the tract of restricted and tax-exempt land must be acquired by restricted Indians before the land remains restricted and tax-exempt during the life of its inheritors.

In *Brown* v. *Stufflebean*, 187 F.2d 347, the Circuit Court of Appeals, Tenth Circuit, approved *Kirby* v. *Parker*, *supra*, and held the statute inapplicable unless the entire interest rather than a fractional interest be inherited by restricted Indians. That case involved the restricted and tax-exempt allotment of a Choctaw Indian, who left as her heirs a white husband, four full-blood Indian children and two half-blood grandchildren. Regarding the applicability of the proviso to Section 1 of the Act of 1933, the Court said:

> "9. But it is contended as a matter of law that the deeds of these half-blood Indians were void because not approved either by the Secretary of the Interior or the County Court under Section 1 of the 1933 Act, *supra*. The conclusive answer to this point is that Section 1 is applicable only 'where the entire interest' in restricted and tax-exempt land is inherited by restricted Indians. The section has been consistently so construed in the Eastern District of Oklahoma, *Kirby* v. *Parker*, D.C. 58 F. Supp. 309. While cases from this court construing Section 1 have not reached the precise point, see *Glenn* v. *Lewis*, 10 Cir., 105 F.2d 398; *United States* v. *Watashe*, 10 Cir., 117 F.2d 947; *Johnson* v. *United States*, 10 Cir., 64 F.2d 674; *Quincy* v. *The Texas Company*, 10 Cir., 185 F.2d 139, we think the language of the statute too plain for mistake. The Act of August 4, 1947, 61 Stat. 731, prescribes a wholly different method of the alienation of land of this char-

acter by Indians of half or more Indian blood, but is not retroactive and not a construction of the 1933 Act. Since the entire interest in the restricted and tax-exempt land was not inherited by restricted Indians, the statute is inapplicable."

In this decision the Circuit Court of Appeals definitely denied that the 1947 Act was retroactive or was a construction of the 1933 Act, as stated in the opinion of this Court.

In this connection it will be noted that the 1947 Act does by appropriate language impose personal restrictions, but not tax exemptions, on fractional interests inherited through succeeding generations by restricting the alienation of such lands by part-blood Indians of half or more Indian blood.

The fact that Congress repealed Section 1 of the 1933 Act and imposed restrictions in the Act of 1947 upon fractional interests inherited through succeeding generations clearly shows that Congress did not consider that the 1933 Act restricted such interests. Otherwise it was unnecessary to enact the 1947 Act regarding this provision.

The decision is also correct because the proviso limits the duration of the restrictions and tax exemptions to the life of the first inheritors by providing "such land shall remain restricted and tax-exempt during the life of and so long as held by such restricted Indians * * *."

Assuming that the 1/6th interest inherited by Louisa Winship was restricted and tax-exempt under the provisions of the proviso in question, the restriction and tax exemption remained only during her lifetime. If Congress

had intended that fractional interests of successive inheritors should remain restricted and tax-exempt it would not have used the words, "during the life of and so long as held by such restricted Indians." It would merely have said "shall remain restricted and tax-exempt so long as held by restricted Indians."

Congress has invariably fixed a definite period for the duration of restrictions and tax exemptions imposed by Indian Acts. The words "during the life of and so long as held by" were frequently used by Congress in fixing the duration of restrictions and tax exemptions.

It is settled that upon the death of the heir born after March 4, 1906, the restrictions imposed by the second proviso of Section 9 of the 1908 Act (35 Stat. L. 312) "during the life or lives of" such heirs expires and the homestead becomes unrestricated. *Parker* v. *Riley*, 250 U.S. 56, 63 L. Ed. 847; *United States* v. *Lee*, 108 F.2d 936; *Holmes* v. *United States*, 53 F.2d 960.

It is likewise settled that when the period of restriction is definitely limited that upon expiration thereof the land becomes alienable. The leading and controlling case on that proposition is *Mullen* v. *United States*, 224 U.S. 448, 56 L. Ed. 834. In that case this Court construed the Supplemental Choctaw-Chickasaw Agreement which provided that the homestead should remain inalienable "during the lifetime of the allottee and not exceeding 21 years from date of certificate of allotment." The Court said:

> "The period of restrictions is thus definitely limited, and the clear implication is that when the prescribed period expires the lands were to become alienable; that

> is by the heirs of the allottee upon his death, or by the allottee himself at the end of 21 years."

Applying this rule in the case at bar, the interest of Louisa Winship only remained restricted by the proviso in question during her lifetime and upon her death became alienable by her part-blood husband Louie Winship.

It is significant that petitioners can cite no cases involving the application of the Act in question to successive inheritances by restricted part-blood Indians, nor any case applying the proviso where the entire fractional interest of an ancestor is inherited by such Indians.

Petitioners, by distorting the language of the Act, seek to create doubt as to its meaning and then cite cases urging that ambiguous statutes should be construed in favor of the Indian. These authorities have no application because the language of the Act is clear and there are no doubts to resolve.

The United States Circuit Court of Appeals, Tenth Circuit, has twice held that the language is clear. In *Brown* v. *Stufflebean*, *supra*, the Court said: "We think the language of the statute too plain for mistake."

In *Quincy* v. *The Texas Company*, 185 F.2d 139, the Court referred to the language of the proviso "as narrow and specific," and said:

> "It was intended to delineate with precision a definite class of lands which Congress intended should remain restricted."

Furthermore, it will be noted that the proviso provides that the land shall not only remain restricted for the life

of the inheritor, but that it "shall remain restricted and tax-exempt." Petitioners cite no case, and there are none, where the Court will impose a tax exemption by construction or implication. The Court will not resolve doubts in favor of tax exemptions.

In *Oklahoma Tax Commission* v. *U. S.*, 319 U.S. 598, 87 L. Ed. 1094, this Court said the rule that tax exemptions are not granted by implication applies as well to taxing acts effecting Indians as to all others. See also *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, 82 L. Ed. 907; *Board of County Commissioners of Creek Co.* v. *Sieber*, 130 F.2d 663, *affirmed by this Court*, 63 Sup. Ct. 920, 318 U.S. 705.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for certiorari should be denied.

Respectfully submitted,

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Counsel of Record:

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January, 1957.

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In the

SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 34516

K. O. GATES, *ET AL., Plaintiffs in Error,*

vs.

REX F. CURRY, *ET AL., Defendants in Error.*

BRIEF OF *AMICI CURIAE*.

The undersigned attorneys of the Tulsa Region, Office of the Solicitor, Department of the Interior, Geo. B. Schwabe, Jr., Regional Solicitor, Jesse L. Ballard, Assistant Regional Solicitor, and Billie W. Crain, Field Solicitor (successor to Supervising Probate Attorney), under authority of the Acts of Congress approved January 27, 1933 (47 Stat. 777), and August 4, 1947 (61 Stat. 731), appearing in their official capacity *amici curiae* on behalf of the Secretary of the Interior, respectfully submit that an opinion was rendered herein by this Court on November 8, 1955, reversing the judgment of the trial court, and urge that a rehearing be granted by the Court for reasons hereinafter stated.

I.

The historical policy of the Congress and the Legislative history regarding the rights of a restricted Indian and his lands have been overlooked by the Court in its opinion of November 8, 1955.

II.

The opinion does not take into consideration those decisions of the Federal Courts resolving all doubts in favor of the Indian and restrictions where doubt and ambiguity have arisen.

III.

The Court's opinion of March 31, 1953, should be permitted to stand.

Statement.

The principal restricted Indian in this case has been divested of any interest in the premises in this suit, either by deed to Louise Smalling or by his deed, approved later, to Rex F. Curry. For this reason, the undersigned are concerned with the effect the opinion of November 8, 1955, will have upon the interests of other Indians in the same property, and also upon all other restricted part-blood Indian heirs of more than one-half blood who similarly have inherited restricted and tax-exempt lands between January 27, 1933, and August 4, 1947, over whom Departmental supervision has been retained by authority of the Act of August 4, 1947.

I.

The Historical Policy of the Congress and the Legislative History Regarding the Rights of a Restricted Indian and His Lands Have Been Overlooked by the Court in Its Opinion of November 8, 1955.

A review of legislative history pertaining to members of the Five Civilized Tribes discloses that governmental guardianship over these Indians has expanded and broadened from time to time by the reimposition of restrictions

upon the alienation of lands belonging to certain classes of Indian heirs, and that restrictions have been placed upon their funds in the hands of the Secretary of the Interior.

Although Section 9 of the Act of May 27, 1908 (35 Stat. 312), removed the restrictions on alienation of allotments at the death of the allottee, it continued supervision, through the County Courts, over the sale of lands acquired by full-blood heirs, thus imposing a new restriction on full-blood heirs generally which had not previously existed; and the Act of April 12, 1926 (44 Stat. 339), amended Section 9 of the Act of 1908 to include and extend restrictions to the omitted full-blood devisees who had previously been unrestricted.

The Act of May 10, 1928 (45 Stat. 495), broadened and expanded tax exemptions to full-blood heirs and devisees in lands certified as tax-exempt in accordance with the Act.

Section 1 of the Act of January 27, 1933 (47 Stat. 777), created an entirely new class of restricted Indians, namely, heirs and devisees of one-half blood or more. Moreover, it placed funds and securities in the hands of the Secretary of the Interior belonging to these Indians under the guardianship of the Government. The Act also extended the benefit of tax immunity under certain circumstances to restricted lands inherited by Indians of one-half blood or more.

The Act of June 26, 1936 (49 Stat. 1967), and the Act of June 20, 1936 (49 Stat. 1542), as amended by the Act of May 19, 1937 (50 Stat. 188), are other examples of the expansion of guardianship and supervision generally over restricted Indians. These Acts declare that certain lands pur-

chased with restricted funds are instrumentalities of the Federal Government and non-taxable until otherwise directed by Congress, and that such lands are subject to restrictions against alienation or encumbrance except with the approval of the Secretary of the Interior.

The Act of August 4, 1947 (61 Stat. 732), imposed restrictions upon the conveyance of *any* interest in lands by *any* heir of one-half or more Indian blood where the lands had been restricted in the ancestor, thereby adding another new class of part-blood Indian heirs under governmental supervision who had theretofore been wholly unrestricted. It might be further observed that the Act of 1947, while not pertinent to the instant case (other than the positive statement regarding this line of legislative reasoning and policy shown therein), contains positive statements in favor of restrictions upon part-blood Indian heirs, where doubt had been raised as to the continuation of such restrictions under the Act of 1933, and made secure to this class of Indian heirs certain tax exemptions the status of which was uncertain under previous Acts of Congress.

Congress saw fit to continue its policy of guardianship and supervision over the Indian heirs of one-half or more Indian blood when it enacted the Act of August 11, 1955 (69 Stat. 666), indefinitely extending restrictions. This Act permits an Indian to appeal from an order of the Secretary removing his restrictions.

An inescapable conclusion is drawn from the study of the Indian legislation that Congress had adopted a policy of continuous expansion of its protection of the individual Indian where it has become evident that Indians of certain classes require governmental guardianship to conserve the

property and funds which have come to them by virtue of tribal membership.

II.

The Opinion Does Not Take Into Consideration Those Decisions of the Federal Courts Resolving Doubts in Favor of the Indian and Restrictions Where Doubt and Ambiguity Have Arisen.

Legislation by the Congress of the United States restricting the alienation of Indian land has always been considered by the Courts as a protection in favor of the Indians and a right exercised by the United States in behalf and for the benefit of its Indian wards. Where various Acts of Congress lend themselves to an interpretation in favor of the Indian and restrictions, it has long been the established policy of the Supreme Court of the United States, and subordinate Federal Courts, to adopt such interpretation. (*Choate* v. *Trapp,* 224 U. S. 665, 56 L. ed. 941, 32 S. Ct. 565; *Taylor* v. *Tayrien,* 51 F. 2d 884; *Drummond* v. *United States,* 131 F. 2d 568.) In the case of *Ward* v. *United States* (139 F. 2d 79) the Court of Appeals construed ambiguous statutory provisions as broadening the scope of restrictions. Thus, where ambiguity or doubt has been expressed or raised, the Court, by positive statement, has resolved these elements in favor of restrictions and continuance of tax exemption rights.

The opinion of November 8, 1955, does not take into account the judicial policy of favoring restrictions when construing or interpreting Indian legislation, as announced in the cases cited above. The opinion manifests doubt as to the meaning of the first proviso of the Act of January 27,

1933, but, nevertheless, concludes that said proviso does not continue restrictions on the "Louisa Taylor interest after her death and during the life of and as long as held by her restricted Indian successors."

At this point it is appropriate, we think, to present a brief review of the status of allotted lands of members of the Five Civilized Tribes with respect to restrictions and taxation prior to the enactment of the Act of January 27, 1933. In that connection, we first refer to and quote from the decision of the Circuit Court of Appeals, Tenth Circuit, in the case of *Glenn* v. *Lewis*, 105 F. 2d 398. In that case the Court of Appeals was called upon to determine whether a certain one-third interest in the homestead allotment of a deceased full-blood Chickasaw Indian was restricted in the hands of his heir by virtue of the provisions of Section 1 of the Act of January 27, 1933. The full-blood allottee had died on a date subsequent to the effective date of said Act, and the heir to whom said one-third interest descended was an enrolled seven-eighth blood Choctaw Indian. The aforementioned homestead allotment had been certified as tax-exempt prior to the death of the allottee.

The court answered this question in the affirmative, saying:

> "It is important to consider the status of allotted lands of members of the Five Civilized Tribes with respect to restrictions and taxation prior to the enactment of the last-mentioned act.
>
> "Since July 26, 1908, by virtue of Sec. 1 of the Act of May 27, 1908, homestead allotments of members of the Five Civilized Tribes of one-half or more Indian blood have been restricted against alienation or encom-

brance without the approval of the Secretary of the Interior.

"Sec. 9, as amended, of the Act of May 27, 1908, provides that the death of an allottee shall remove all restrictions except as to lands of a full-blood Indian acquired by inheritance or devise from an allottee, and subject such lands in the hands of the Indian heir or devisee to qualified restrictions.

"(1) Under the Act of May 27, 1908, as amended, by the Act of April 12, 1926, funds in the hands of the Secretary of the Interior which passed by inheritance or devise to full-blood Indian heirs or devisees remained restricted. *Parker* v. *Richard,* 250 U. S. 235, 239, 240, 39 S. Ct. 442, 63 L. ed. 954.

"(2) Prior to April 26, 1931, allotted lands held by the original allottees and allotted lands acquired by full-blood Indians through devise or inheritance from an allottee and held by the heir or devisee were nontaxable. Sec. 4, Act of May 27, 1908, 35 Stat. 313; *Powell* v. *City of Ada,* 10 Cir., 61 F. 2d 283, 285. *On the death of the allottee, allotted lands, except those passing by devise or inheritance to full-blood Indian heirs,* became subject to taxation. *Parker* v. *Richard, supra,* 250 U. S., page 239, 39 S. Ct. 442, 63 L. ed. 954; *United States* v. *Shock,* C. C., 187 F. 870, 872, 873.

"Since April 26, 1931, restricted lands have been subject to taxation, except not to exceed 160 acres of land while held by the allottee or by a full-blood Indian heir or devisee, for which a tax exemption certificate had been issued.

"Sec. 1 of the Act of January 27, 1933, first deals with funds and other securities under the supervision of the Secretary of the Interior belonging to Indians of the Five Civilized Tribes of one-half or more Indian blood, enrolled or unenrolled. It imposes restrictions on such funds and makes them subject to the jurisdiction of the Secretary of the Interior until April 26, 1956.

The first proviso of the section deals with restricted and tax-exempt land belonging to members of the Five Civilized Tribes acquired by inheritance, devise, or gift, or by purchase with restricted funds by or for restricted Indians, and provides that such lands shall remain restricted and tax exempt while held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law.

"The specific question presented is, Who are restricted Indians within the meaning of such proviso?

"(3) Under the Act of May 10, 1928, Indians of one-half or more Indian blood were restricted Indians and full-blood Indian heirs were restricted Indians. Under the Act of April 12, 1926, full-blood Indian heirs and devisees were restricted Indians. Hence, if Congress, in using the phrase 'restricted Indians,' had in mind Indians who were subject to restrictions with respect to the encumbrance or conveyance of their lands at the time the act was adopted, the phrase would include Indians of the half-blood.

"In that portion of the act which precedes the first proviso, Congress imposed restrictions as to funds and securities under the supervision of the Secretary of the Interior belonging to Indians of half or more Indian blood. The source of such funds was largely lands. If it were necessary to protect the funds, it would seem equally necessary to protect the source of such funds. *Hence, it is reasonable to suppose that Congress intended to restrict the lands of half-bloods or more acquired by inheritance or devise.*

"Furthermore, the first proviso deals with lands acquired by inheritance or devise. Allotted lands acquired through inheritance or devise by full-blood Indians were already restricted by Sec. 9 of the Act of May 27, 1908, as amended by the Act of April 12, 1926, and to the extent of 160 acres when a tax exemption cer-

tificate had issued therefor, exempt from taxation by the Act of May 10, 1928, and it was unnecessary to impose restrictions or provide for tax exemption as to full-blood Indian heirs or devisees. *This indicates an intention on the part of Congress to deal with an Indian heir or devisee of less than full blood.*

"Moreover, the subsequent Act of February 11, 1936, 49 Stat. 1135, c. 50, 25 U. S. C. A., Sec. 393a, is a legislative construction that the first proviso of the Act of 1933 embraces members of the Five Civilized Tribes *of one-half or more* Indian blood. The Act of 1936 permits 'Indians of the Five Civilized Tribes * * * of one-half or more Indian blood, enrolled or unenrolled,' to lease their restricted land for a specified period. Unless the first proviso covers Indians of the half-blood, there could be no unenrolled Indians of the half-blood to whom the Act of 1936 could apply, for unenrolled Indians never received allotments, the special estates created by Sec. 9 of the Act of May 27, 1908, terminated April 26, 1931, and, *prior to the Act of 1933, Indian heirs of less than the full-blood, whether enrolled or unenrolled, took inherited land free from restrictions, and needed no statutory permission to lease their lands.*

"Finally, such has been the administrative construction of the act. See *Solicitor's Opinion,* 54 Interior Decisions 382, 1934, and 3 Fed. Reg. (1938), pp. 877, 884.

"Counsel for defendants rely upon statements made at the hearing on the bill before a subcommittee of the Senate Committee on Indian Affairs. 72nd Cong., 1st Sess., on H. R. 8750, which ultimately became the Act of January 27, 1933. The statements consist of testimony of senators, representatives, a lawyer from the Department of the Interior, and various tribal attorneys. It may be doubted that resort can properly be had to such statements as an aid in construing the act. See *Wright* v. *Vinton Branch of Mountain Trust Bank,*

300 U. S. 440, 463, 464, footnote 8, 57 S. Ct. 556, 81 L. ed. 736, 112 A. L. R. 1455; *Pennsylvania Railroad Co.* v. *International Coal Company,* 230 U. S. 184, 198, 199, 33 S. Ct. 893, 57 L. ed. 1446, Ann. Cas. 1915A, 315. But assuming they may be considered, many other statements equally authoritative made during the hearing support the construction *that the purpose of the proviso was to continue restrictions and tax exemptions after restricted lands had been acquired by devise, inheritance, or gift, or by purchase with restricted funds by members of the Five Civilized Tribes,* enrolled or unenrolled, of *one-half or more Indian blood.*" (Emphasis supplied. Footnotes omitted.)

Thus, in the light of *Glenn* v. *Lewis, supra,* it may be observed that the term "restricted Indians," as used in the proviso to Section 1 of the 1933 Act, in so far as it relates to Indians of the Five Civilized Tribes, obviously embraces Indians of one-half or more Indian blood. It may also be observed that the proviso applies only to lands which are both restricted and tax-exempt, and unless both elements are present the proviso is without application. At the time of the passage of the Act of January 27, 1933, the only lands possessing both of these characteristics were those lands which the Indians had selected as their tax-exempt acreage under the provisions of Section 4 of the Act of May 10, 1928. It may also be observed that the tax-exempt selections were to embrace two classes of restricted lands: (*1*) restricted allotments of living allottees and (*2*) lands inherited by or devised to full-blood Indians in whose hands the lands were subject to the restriction that no conveyance by them should be valid unless approved by the proper local court. (See *Chisholm* v. *House,* (10th Cir.) 160 F. 2d 632.)

In enacting the aforementioned proviso, we think Congress must be deemed to have legislated in the light of this existing situation and to have had both classes of restricted and tax-exempt land in mind.

Another observation to be made is that the case of *Glenn* v. *Lewis, supra,* fairly demonstrates the policy of the Federal Courts to adhere to the rule, in construing doubtful or ambiguous language of Indian legislation, in favor of the Indian and restrictions.

III.

The Court's Opinion of March 31, 1953, Should Be Permitted to Stand.

The opinion of this Court of March 31, 1953 (24 Okla. Bar Journal, No. 11, page 558), holds, in effect, that the inherited undivided interest of Louie Winship in the land in question was restricted against alienation and was also tax-exempt on June 6, 1940, when he executed and delivered a warranty deed to Louise Smalling which purported to convey his interest in the said land. From that opinion we quote (p. 561):

> "We, therefore, hold that when Sallie Lowman died intestate, subsequent to the effective date of the Act of January 27, 1933, 47 Stat. L. 777, she then being seized of land tax-exempt and restricted, that the undivided 1/6th interest in the land by devolution vested in Louisa Taylor Winship, her daughter, a full-blood Choctaw Indian. Louisa died intestate in August, 1937, leaving as her sole heirs, her husband, Louie Winship, a 3/4ths blood Choctaw Indian, and her daughter, Flora, a 7/8ths blood Choctaw Indian. Thus Louie and Flora inherited the 'entire interest' of Louisa each receiving an undivided 1/12th interest restricted and tax-exempt,

in and to the lands which Louisa had inherited from her mother, Sallie Lowman, the allottee of said land.

"We think that a reasonable construction of the Act leads to the conclusion that Congress intended that it apply to a 'second inheritance.' It seems reasonable to assume that Congress was equally solicitous in the protection of the second devolution where each inheritor was an Indian of one-half degree or more of Indian blood."

We know of no good reason why the Court should recede from its view expressed above. *i. e.*, "It seems reasonable to assume that Congress was equally solicitous in the protection of the second devolution where each inheritor was an Indian of one-half degree or more of Indian blood." This view of the Court is not without precedent, for in *Brown* v. *Minshall*, 83 Okl. 98, 202 Pac. 1037, it seems that a similar view was expressed by the Court. In that case it was contended that the restriction contained in Section 9 of the Act of May 27, 1908, was personal to the heir of the allottee, and therefore had no application to the land after the same had been once inherited by the heirs of the allottee, or when such lands are inherited by an heir from the heir of the deceased allottee. Said the Court:

"Counsel for the defendants contend that, under said section, *supra,* the restriction contained in Section 9 is personal to the heir of the allottee, and has no application to the lands after the same have been once inherited by the heirs of the allottee, or when such lands are inherited by an heir from the heir of the deceased allottee. It is their contention that the restriction contained in the proviso in Section 9, *supra,* does not run with the land. We cannot concur in this contention made by counsel for the defendants. *We believe that it was*

the intention of the Congress under the plain and unmistakable language of the proviso of Section 9 that the lands of a deceased allottee should be restricted as long as the same are inheritable by full-blood heirs, or until the restrictions upon such lands expire by operation of law, which, under the provisions of the act, would be April 26, 1931.

"*It is clear from the language of the proviso to Section 9, supra, that it was the purpose of the Congress to protect the full-blood Indian heir from making an improvident disposition of such lands, and to afford them the protection of the probate courts of Oklahoma in making disposition of such estates.* It is a fundamental rule uniformly adhered to by the courts in the constructions of statutes to give them a reasonable construction. *There is no more reason for the Congress protecting the full-blood child of the deceased allottee than in affording the same protection to the full-blood grandchild.* * * *" (Emphasis supplied.)

In this connection, see also, *Grisso* v. *United States,* 138 F. 2d 996, 1000, and *Ward* v. *United States,* 139 F. 2d 79, 82.

With respect to the holding in the March 1953 opinion, *supra,* that the interest of Louie Winship in the land in question was tax-exempt at the time he gave the warranty deed to Louise Smalling, it is our view that the holding is correct. It is to be remembered that, on May 27, 1930, during the lifetime of Sallie Lowman, the allotment of Sallie Lowman was, pursuant to the Act of May 10, 1928 (45 Stat. 495), selected and designated as land to remain exempt from taxation. Thus, at the date of the death of Sallie Lowman (November 3, 1933), her allotment was exempt from taxation. Under Section 1 of the Act of January 27, 1933, this land, in the hands of "restricted Indians," continued to be exempt from taxation. In that respect, Section 1 of the

1933 Act provides that where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance by "restricted Indians," such lands shall remain tax-exempt "during the life of and as long as held by such restricted Indians," but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law.

In effect, the afore-mentioned opinion holds Louie Winship to be a "restricted Indian" within the meaning of that term as it appears in the 1933 Act, *supra.* Said opinion also holds, in effect, that (*a*) the undivided proportional interest in the allotment of Sallie Lowman which came to Louie Winship by inheritance from his wife, Louisa, was, in the hands of Louie Winship, restricted against alienaton; (*b*) in the absence of the removal of this restriction "in a manner provided by law," Louie Winship could not make a valid and effective conveyance of his undivided proportional interest in the land; and (*c*) at the time the warranty deed, dated June 6, 1940, of Louie Winship to Louise Smalling, was executed and delivered, the undivided proportional interest in the land described therein which Louie Winship purported to convey to Louise Smalling was restricted against alienation and, therefore, the said deed was invalid and did not operate to divest Louie Winship of his title to said undivided proportional interest in the land. It is our view that these holdings, without more, are decisive and correct.

As we read and understand the subsequent opinion herein, *i. e.*, the opinion of November 8, 1955 (26 Oklahoma Bar Journal, No. 26, pp. 1748-1750), the holding of that opinion

is to the effect that (*a*) Louie Winship was not a restricted Indian, within the meaning of that term as it appears in the 1933 Act, *supra,* and (*b*) at the time Louie Winship deeded to Louise Smalling his inherited undivided proportional interest in the Sallie Lowman allotment, said interest was not restricted.

In *Glenn* v. *Lewis,* 105 F. 2d 398, the Court of Appeals, Tenth Circuit, was called upon to determine whether a certain seven-eighths blood Choctaw Indian was a restricted Indian within the meaning of the first proviso of Section 1 of the 1933 Act, *supra.* The Court answered the question in the affirmative, saying (*Id.,* p. 401):

> "The specific question presented is, Who are restricted Indians within the meaning of such proviso?
>
> "(3) Under the Act of May 10, 1928, Indians of one-half or more Indian blood were restricted Indians and full-blood Indian heirs were restricted Indians. Under the Act of April 12, 1926, full-blood Indian heirs and devisees were restricted Indians. Hence, if Congress, in using the phrase 'restricted Indians,' had in mind Indians who were subject to restrictions with respect to the encumbrance or conveyance of their lands at the time the act was adopted, the phrase would include Indians of the half-blood.
>
> "In that portion of the act which precedes the first proviso, Congress imposed restrictions as to funds and securities under the supervision of the Secretary of the Interior belonging to Indians of half or more Indian blood. The source of such funds was largely lands. If it were necessary to protect the funds, it would seem equally necessary to protect the source of such funds. *Hence, it is reasonable to suppose that Congress intended to restrict the lands of half-bloods or more acquired by inheritance or devise.*

"Furthermore, the first proviso deals with lands acquired by inheritance or devise. Allotted lands acquired through inheritance or devise by full-blood Indians were already restricted by Sec. 9 of the Act of May 27, 1908, as amended by the Act of April 12, 1926, and to the extent of 160 acres when a tax exemption certificate had issued therefor, exempt from taxation by the Act of May 10, 1928, and it was unnecessary to impose restrictions or provide for tax exemption as to full-blood Indian heirs or devisees. *This indicates an intention on the part of Congress to deal with an Indian heir or devisee of less than full blood.*

"Moreover, the subsequent Act of February 11, 1936, 49 Stat. 1135, c. 50, 25 U. S. C. A., Sec. 393a, is a legislative construction that the first proviso of the Act of 1933 embraces members of the Five Civilized Tribes of *one-half or more* Indian blood. The Act of 1936 permits 'Indians of the Five Civilized Tribes * * * of one-half or more Indian blood, enrolled or unenrolled,' to lease their restricted land for a specified period. Unless the first proviso covers Indians of the half-blood, there could be no unenrolled Indians of the half-blood to whom the Act of 1936 could apply, for unenrolled Indians never received allotments, the special estates created by Sec. 9 of the Act of May 27, 1908, terminated April 26, 1931, and, *prior to the Act of 1933, Indian heirs of less than the full-blood, whether enrolled or unenrolled, took inherited land free from restrictions, and needed no statutory permission to lease their lands.*

"Finally, such has been the administrative construction of the act. See *Solicitor's Opinion*, 54 Interior Decisions 382, 1934, and 3 Fed. Reg. (1938), pp. 877, 884." (Emphasis supplied.)

The *Solicitor's Opinion* mentioned above construed the Act of 1933, for administrative purposes, as applying to

Indian heirs or devisees, whether full-blood or part-blood. The Superintendent for the Five Civilized Tribes, therefore, has viewed second inheritors and devisees as being in the class of Indians entitled to the benefits of restrictions and tax exemptions. The Court, in its initial opinion (March 31, 1953), indicated a similar view.

Other judicial decisions holding to the view that members of the Five Civilized Tribes of one-half or more Indian blood are restricted Indians within the first proviso of the 1933 Act, *supra*, are: *Burgess* v. *Bosen*, 31 F. Supp. 352; *United States* v. *Easley*, 33 F. Supp. 442; and *United States* v. *Meadors*, 70 F. Supp. 800.

In *United States* v. *Easley, supra*, it was said (p. 443):

> "The purpose of the Act of 1933 was to deal with Indian heirs or devisees *of less than full blood* and to place restrictions upon the alienation of the particular class of lands dealt with in the hands of Indian heirs of one-half or more degree of blood. *Glenn* v. *Lewis*, 10 Cir., 105 F. 2d 398. * * *." (Emphasis supplied.)

If the foregoing decisions of the Federal courts construing the Federal statute involved are correct—and in our view, they are correct—then, clearly, the opinion of the Court of November 8, 1955, *supra*, is in error in holding that Louie Winship was not a restricted Indian within the meaning of that term as it appears in the 1933 Act, *supra*.

It is our view that said opinion of November 8, 1955, *supra*, is in error in holding that, at the time Louie Winship deeded to Louise Smalling his inherited undivided proportional interest in the Sallie Lowman allotment, said interest was not restricted.

The holding, as we understand from reading the opinion, is predicated on the proposition that the provisions of the 1933 Act, *supra,* are not applicable in a case where land in the category of that dealt with in the Act has passed, by inheritance, into the hands of an heir of an heir of the ancestral owner of the land; and, therefore, the undivided proportional interest in the Sallie Lowman allotment which came to Louie Winship by inheritance from his wife, Louisa, was, in the hands of Louie Winship, not restricted against alienation.

This holding, and also the proposition upon which the Court seems to have relied as the predicate therefor, appears to us as being contrary to the views this Court entertained and expressed in *Brown* v. *Minshall, supra,* heretofore quoted.

In *Whitchurch* v. *Burge,* 17 F. Supp. 234, the Court said, with respect to the 1933 Act, *supra,* (p. 240):

> "This Act of January 27, 1933, contains no declaratory provision that it should not have the effect of reimposing restrictions. It was dealing with lands allotted to members of the Five Civilized Tribes and related to members of said tribes, enrolled and unenrolled. *The context of this act does not indicate any purpose to restrict it to the immediate heir or heirs of the original allottee.*" (Emphasis supplied.)

Louie Winship was an heir of an heir of the allottee, Sallie Lowman. Hence, on that premise, it is our view that this Court, too, might well and appropriately say in this case that the context of the 1933 Act, *supra,* does not indicate any purpose to restrict its provisions to the immediate heir or heirs of the original allottee. Such an interpreta-

tion of the 1933 Act would accord with the rule of interpretation reflected in this Court's opinion in *Brown* v. *Minshall, supra.* To paraphrase from the opinion in that case: There is no more reason for the Congress to protect the restricted Indian heirs of the deceased allottee than to afford the same protection to the restricted heir of a restricted heir of such an allottee.

Apart from the discussion herein on legal aspects of this case, the following may be said:

If the Court's opinion of November 8, 1955, stands as the final decision in this case, the long-standing interpretation of the 1933 Act by the Department of the Interior, and also by the tax authorities of the State of Oklahoma, will be reversed, resulting in uncertainty and confusion. Especially will this be true with respect to the taxable status of lands and interests in lands heretofore considered tax-exempt under the 1933 Act and carried over as tax-exempt pursuant to the provisions of Section 6 of the 1947 Act. Tax authorities, as well as the Department of the Interior, would be faced with the enormous task of ferreting out and placing these lands on the tax rolls, and collecting delinquent taxes for the years during which such lands were deemed to have been tax-exempt. The individual Indians involved would be forced to bear the hardship of having to pay delinquent taxes on lands they believed, in good faith, were free from taxation.

Congress has always considered the welfare of the Indians of the Five Civilized Tribes in enacting legislation, and it is our belief that the 1933 Act contemplates continued protection for the heirs of restricted lands, whether they may be first, second, third, or tenth in line of devolution.

Except for restricted lands purchased with restricted funds, the interpretation of the 1933 Act expressed in this brief would not have the effect of causing any new lands or interests therein to become free from taxation; it merely would have the effect of continuing the right of tax exemption on lands which were not made subject to taxation by the presently existing Congressional enactments.

Conclusion.

For the reasons stated herein, a rehearing should and ought to be granted.

Respectfully submitted,

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February, 1956.